REC'D AUG 1 C REC'D

Name: JENNIFER L. ATTREP

JUDICIAL SELECTION COMMISSION

Application for Judicial Vacancy on the New Mexico Court of Appeals

APPLICATION

PERSONAL

1. Full Name	Jennifer L. Attrep
2. County of Residence	Santa Fe, New Mexico
3. Birthplace	Dallas, Texas
4. If born outside the US, give the basis for your citizenship	
5. Birth Date	09/28/[redacted]
6. Marital Status	Married
7. If married, list spouse's full name	Todd A. Coberly
8. Spouse's occupation	Attorney

9. Do you have any other familial relationships that might present conflicts if you were to be seated as a judge? If so, please explain these relationships and how you would address any conflicts.

Answer 9: No.

10. List all places of residence, city and state, and approximate dates for the last 10 years

Date(s)of Residence	Street Address	City	State	Zip
2012 to present	611 Caminito del Sol	Santa Fe	NM	87505
2012	702 Camino Militar	Santa Fe	NM	87501
2010 to 2012	40 Camino de Milagro	Santa Fe	NM	87506
2009 to 2010	2106 O Street NW	Washington	DC	20037
2006 to 2009	1530 Key Blvd, Apt 726	Arlington	VA	22209

EDUCATION

11. List schools attended with dates and degrees (including all post-graduate work)	
High School(s)	Los Alamos High School, 1996, High School Diploma, *Valedictorian*
College(s)	College of William & Mary, 1999, Bachelor of Arts in Economics and Government, *summa cum laude*, Phi Beta Kappa
Law School(s)	University of Virginia, School of Law, 2006, Juris Doctorate, top 15%, Managing Editor of the *Virginia Law Review*

12. Bar Admissions and Dates	New Mexico (2010) District of Columbia (2007) Virginia (2006) U.S. Court of Appeals for the Tenth Circuit (2011) U.S. District Courts for the District of New Mexico (2010), District of Columbia (2007), and Eastern District of Virginia (2007)

EMPLOYMENT

13. List Your Present Employment	
Date(s) of Employment	March 2015 to present
Employer	State of New Mexico First Judicial District Court
Mailing Address	P.O. Box 2268, Santa Fe, NM 87504
Business Phone	505-455-8290
Position	District Court Judge, Division V
Duties	Preside over mixed docket (civil, criminal, and family law) in Santa Fe, Rio Arriba, and Los Alamos Counties
Supervisor	N/A
14. List Your Previous Employment (beginning with most recent)	
Dates of Employment	January to March 2015 May 2012 to August 2014
Employer	Coberly & Attrep, LLLP
Mailing Address	1322 Paseo de Peralta, Santa Fe, NM 87501
Business Phone	505-989-1029
Business FAX	505-629-1560
Employer's Email Address	N/A
Position	Partner
Dates of Employment	September to December 2014
Employer	State of New Mexico First Judicial District Court
Mailing Address	P.O. Box 2268, Santa Fe, NM 87504
Business Phone	505-455-8250
Business FAX	505-455-8280
Employer's Email Address	N/A
Position	District Court Judge, Division IX
Dates of Employment	2010 to 2012
Employer	Long, Pound & Komer, P.A.
Mailing Address	2200 Brothers Road, Santa Fe, NM 87505
Business Phone	505-982-8405
Business FAX	505-982-8513
Employer's Email Address	nancy@longkomer.com
Position	Associate
Dates of Employment	2009 to 2010, 2006 to 2007, Summer 2005
Employer	Williams & Connolly LLP
Mailing Address	725 12th Street NW, Washington, DC 20005
Business Phone	202-434-5000
Business FAX	202-434-5029
Employer's Email Address	info@wc.com
Position	Associate
Dates of Employment	2007 to 2008
Employer	The Hon. Richard J. Leon
Mailing Address	U.S. District Court for the District of Columbia 333 Constitution Ave., NW, Washington, DC 20001

Business Phone	202-354-3580
Business FAX	N/A
Employer's Email Address	N/A
Position	Law Clerk
Dates of Employment	Summer 2004
Employer	The Hon. Gerald Bruce Lee
Mailing Address	U.S. District Court for the Eastern District of Virginia 401 Courthouse Square, Alexandria, VA 22314
Business Phone	703-299-2117
Business FAX	N/A
Employer's Email Address	N/A
Position	Intern
Dates of Employment	2000 to 2003
Employer	Federal Reserve Board
Mailing Address	20th & C Streets NW, Washington, DC 20551
Business Phone	202-452-3000
Business FAX	N/A
Employer's Email Address	N/A
Position	Research Assistant
Dates of Employment	2000
Employer	Navigant Consulting
Mailing Address	1200 19th Street, NW, Suite 700, Washington, DC 20036
Business Phone	202-973-2400
Business FAX	202-973-2401
Employer's Email Address	N/A
Position	Associate
Dates of Employment	Summer 1998
Employer	The Hon. Pete V. Domenici
Mailing Address	Hart Senate Office Building, Washington, DC 20510
Business Phone	N/A
Business FAX	N/A
Employer's Email Address	N/A
Position	Intern

Note: No. 14 is a separate table which enables you to copy and paste it as many times as necessary to list all previous employers.

PARTNERS AND ASSOCIATES

15. List all partners and associates, beginning with the current or most recent:
Answer 15: COBERLY & ATTREP, LLLP Todd Coberly, Partner Abby Sullivan Engen, Associate (former) LONG, POUND & KOMER, P.A. Nancy Long, Partner

John Pound, Partner (former)
Mark Komer, Partner
Mark Baker, Partner (former)
Justin Miller, Associate (former)
Little West, Associate (former)
WILLIAMS & CONNOLLY LLP
Because there are over 200 partners and associates at Williams & Connolly, I only list those attorneys I worked with closely before leaving the firm.
Dane Butswinkas, Partner
Meg Keeley, Partner
Hack Wegman, Partner
Jon Landy, Partner
Nathan Kitchens, Associate (former)
Anna-Rose Matheson, Associate (former)
Eric Harrington, Associate (former)
Tyler Frances, Associate (former)

EXPERIENCE

16. How extensive is your experience in Personal Injury Law?

Answer 16: **Extensive.**

Judicial experience: During my tenure on the bench, I have been, and am currently, responsible for a large civil docket. A number of these cases involve claims for personal injury, medical malpractice, negligence, tort, and wrongful death. I have ruled on numerous dispositive motions in these cases, addressing State and tribal immunity, the Uninsured Motorist Act, and the Workers' Compensation Act, as just a few examples. I have presided over week-long jury trials involving personal injury and wrongful death claims. Please see my Answer to Question 22.

Private practice: My private civil practice ranged from civil rights litigation (which often involved personal injury claims) to wrongful death on both the plaintiff's and the defendant's sides. I have represented plaintiffs in excessive force and wrongful death actions, obtaining favorable settlements for my clients. When I practiced at Long, Pound & Komer and Williams & Connolly, I represented a number of government entities and private companies against civil lawsuits ranging from medical malpractice and negligence to Title VII claims. As an example, I twice obtained dismissal of a complaint against my clients, the University of New Mexico and several UNM employees, for claims of race discrimination and assault and battery. See Gerald v. Locksley, 785 F. Supp. 2d 1074 (D.N.M. 2011); Gerald v. Locksley, 849 F. Supp. 2d 1190 (D.N.M. 2011).

17. How extensive is your experience in Commercial Law?

Answer 17: **Extensive.**

Judicial experience: A number of the cases on my civil docket involve commercial law. I handle cases involving breach of contract, misrepresentation and fraud, real estate, Unfair Trade Practices Act (UPA), insurance bad faith, and taxation. I have issued dispositive rulings in a number of these areas. In addition, I have conducted numerous bench and jury trials involving commercial disputes, ranging from easements and foreclosures to UPA and breach of contract. Please see my Answers to Questions 22 and 23.

Private practice: In private practice, I litigated cases involving contract and employment disputes, as well as securities matters. For example, while at Long, Pound & Komer, I took over a case in which a

disappointed bidder sued our clients, cabinet and deputy secretaries of NMDOT, for contract and Section 1983 claims. I fully briefed the appeal and obtained a reversal for my clients, with the Tenth Circuit agreeing that my clients were entitled to qualified immunity. See Fisher Sand & Gravel, Co. v. Giron, 465 F. App'x 774 (10th Cir. 2012). While at Williams & Connolly, I worked on complex commercial litigation, ranging from accounting and attorney malpractice to securities litigation and the False Claims Act. This litigation involved nationwide lawsuits, which were incredibly document-intensive and spanned many years.

18. How extensive is your experience in Domestic Relations Law?

Answer 18: **Extensive.**

Judicial experience: During my tenure on the bench, I was responsible for a large domestic relations docket for approximately one year. During this time, I presided over numerous domestic violence cases brought pursuant to the Family Violence Protection Act. I heard and resolved countless disputes related to child custody and visitation, guardianship, adoption, divorce, and property.

19. How extensive is your experience in Juvenile Law?

Answer 19: **Fairly extensive.**

Judicial experience: During my tenure on the bench, I have not presided over the Children's Court. I, however, preside over the Juvenile Drug Court for Rio Arriba County, working with Juvenile Probation and community partners to address the difficult challenges of juvenile delinquency and drug abuse in our community.

20. How extensive is your experience in Criminal Law?

Answer 20: **Extensive.**

Judicial experience: During my tenure on the bench, I have been responsible for the criminal dockets in Los Alamos and Rio Arriba Counties. I currently preside over the entire criminal docket in Rio Arriba County, which consists of approximately 500 new criminal cases per year. I manage every aspect of this significant criminal docket, including conducting arraignments, pretrial detention and release hearings, pretrial conferences, pleas, sentencings, and probation violation hearings. I hold weekly criminal docket days in Tierra Amarilla and regularly hear upwards of 100 cases in a day. I have ruled on countless suppression motions, competency motions, and motions in limine. I have presided over thirty five (35) criminal trials. Additionally, I have ruled on a significant number of petitions for writs of habeas corpus, raising constitutional and conditions of confinement claims. Finally, I spend a significant amount of time presiding over the Adult and Juvenile Drug Courts for Rio Arriba County, which provide an alternative to incarceration for defendants who struggle with substance abuse and co-occurring disorders.

Private practice: A primary focus of my private practice was criminal defense, at all stages of litigation in both state and federal court. As an example, while at Long, Pound & Komer, I took over a federal criminal appeal after the Tenth Circuit had affirmed my client's conviction. After learning the entire case at this late stage, I filed a petition for writ of certiorari in the U.S. Supreme Court. The Supreme Court granted my client's petition, vacated the judgment, and remanded my client's case to the Tenth Circuit for further proceedings. See Pablo v. United States, 567 U.S. 948, 133 S. Ct. 56 (2012). This case had a lasting effect on how the U.S. Attorney's Office in New Mexico handles forensic experts in light of a defendant's right to confrontation. While at Williams & Connolly, I was a member of the trial team that represented a hedge fund manager against federal criminal charges in the Eastern District of New York stemming from the collapse of his hedge funds. This was the first trial of a Wall Street fund manager after the financial crisis of 2007/2008. I am confident that the attorneys I worked with on this case would

tell you that I was an integral member of the trial team and that I worked tirelessly for our client. After a four-week long jury trial, our client was acquitted on all nine counts of conspiracy, securities fraud, and insider trading.

21. How extensive is your experience in Appellate Law?

Answer 21: **Extensive.**

Judicial experience: A portion of my docket involves appeals, including: (1) lower court appeals, requiring trials de novo, (2) administrative agency appeals, requiring full record reviews of agency decisions, (3) petitions for writs of habeas corpus, requiring a review of the trial-level criminal proceedings, and (4) extraordinary writs, requiring review of agency rule and decision making. During my time on the bench, regardless of the type of case, I found the skills I developed as an appellate attorney—e.g., identifying key issues, scrutinizing the record for error, and succinctly arguing why the trial court erred—invaluable to the performance of my duties as a judge. In preparing for hearings, I am able quickly to recognize the key, dispositive issues and press counsel during argument on these issues. Moreover, having served as a district court judge on a busy docket, I have a deep appreciation for the challenges that face our trial-level judges and the need to issue clear, well-reasoned, and easy-to-follow decisions at the appellate level. As a district court judge, I often face legal issues that our appellate courts have yet to address. Researching and writing on these novel legal issues is one of the most enjoyable parts of my job as a judge.

Private practice: My private practice included a significant appellate caseload. I enjoy appellate work immensely, as I am able to immerse myself in discrete factual and legal issues. I have worked on federal and state criminal appeals involving, for example, *Brady/Giglio*, the Confrontation Clause, loss calculations for fraud, and jury instructions for tax evasion, to name a few. I also have worked on a number of civil appeals. As an example, I obtained reversal in the N.M. Court of Appeals of a multi-million dollar civil judgment entered against my client relating to claims for breach of contract, negligent misrepresentation, and fraud. See Freeman v. Fairchild, 2015-NMCA-001, 340 P.3d 610. Additionally, my work on the Pablo case (see my Answer to Question 20) and the Fisher, Sand & Gravel case (see my Answer to Question 17) are examples of my experience in appellate law.

22. How many cases have you tried to a jury? Of those trials, how many occurred within the last two years? Please indicate whether these jury trials involved criminal or civil cases.

Answer 22:

Judicial experience: During my tenure on the bench, I have presided over nearly forty (40) jury trials, on both my civil and criminal dockets. The vast majority of these trials have occurred in the last two years. The civil jury trials I presided over involved wrongful death, insurance bad faith, contract, UPA, fraud, misrepresentation, and negligence. Presiding over these civil jury trials involved significant effort both pretrial and post-verdict, including ruling on motions to compel, motions to dismiss and for summary judgment, *Daubert/Alberico* motions, motions in limine, jury instructions, and motions for new trial and attorney's fees. The criminal jury trials I presided over ranged from DWIs and drug trafficking to assault / battery and homicide. During these trials, I ruled on novel legal issues pertaining to, for example, the Confrontation Clause and sufficiency of evidence for child endangerment cases, to name a few. Given my extensive trial experience as a judge, I am well-versed in the rules of evidence and am able to accurately predict, and prepare for, the variety of evidentiary issues that arise during trial. I also am experienced at maintaining the pace of a trial and have gotten every case to the jury on time.

Private practice: I was on the trial team for a four-week criminal jury trial in the U.S. District Court for the Eastern District of New York in 2009. Please see my Answer to Question 20. As a law clerk in the

U.S. District Court for the District of Columbia, I assisted the court with a number of criminal trials and drafted numerous jury instructions.

23. How many cases have you tried without a jury? How many of these trials occurred within the last two years? Please indicate whether these non-jury trials involved criminal or civil cases.

Answer 23:

Judicial experience: During my tenure on the bench, I have presided over nearly thirty (30) non-jury trials and major evidentiary hearings, on both my civil and criminal dockets. The vast majority of these trials and evidentiary hearings have occurred in the last two years. The civil non-jury trials I have presided over involved the Inspection of Public Records Act, probate, foreclosures, easements, contracts, public nuisance, and fraud. I have issued extensive findings of fact and conclusions of law for my civil bench trials, as well as written decisions on matters not requiring findings and conclusions. The criminal non-jury trials I have presided over involved de novo lower court appeals, preliminary hearings to determine whether probable cause exists, and hearings to determine whether an incompetent defendant should be committed.

Private practice: I was a member of a trial team for a civil matter that was tried before an arbitral tribunal in 2007. The case involved multiple plaintiffs raising accounting malpractice claims across several states. I was deeply involved in trial preparation both in the months leading to trial and during the three-week long bench trial. As a law clerk, I had the privilege of assisting Judge Richard J. Leon in crafting and implementing the first habeas corpus proceedings for Guantanamo Bay detainees. I drafted countless orders on unique issues and assisted Judge Leon with the first evidentiary hearing for six detainees being held at Guantanamo Bay. I then assisted Judge Leon in drafting the decision granting five of the six detainees' petitions and ordering their release.

24. How many appeals have you handled? Please indicate how many of these appeals occurred within the last two years.

Answer 24: I have handled numerous appeals while on the bench and in private practice. Please see my Answer to Question 21. In the two-year period prior to my assuming the bench in 2014, I worked on eight appeals in my private practice. These appeals involved both civil and criminal cases in state and federal court.

PUBLIC OFFICES/PROFESSIONAL & CIVIC ORGANIZATIONS

25. Public Offices Held and Dates

Public Office	Dates
District Court Judge, Division V First Judicial District Court	March 2015 to present
District Court Judge, Division IX First Judicial District Court	September to December 2014

26. Activities in professional organizations, including offices, held, for last 10 years

Professional Organization	Position Held	Dates
Oliver Seth American Inn of Court	Associate	2010 to 2011
First Judicial District Bar Association	Member	2010 to 2011
New Mexico Trial Lawyers Association	Member	2014

27. Activities in civic organizations, including offices, held, for last 10 years		
Civic Organization	Position Held	Dates
Access to Justice, First Judicial District	Member	2015 to present
Rio Arriba Youth Service Provider Partnership	Board Member	2015 to present
Rio Arriba Jail Diversion Pilot Program	Member	2016

28. Avocational interests and hobbies
Answer 28: I have a beautiful, five-year-old daughter named Eleanor. My time away from work is spent caring for, loving, and raising my daughter. I share my own interests of cooking, music, and the outdoors with Eleanor.

29. Have you been addicted to the use of any substance that would affect your ability to perform the essential duties of a judge? If so, please state the substance and what treatment received, if any.
Answer 29: [redacted]
30. Do you have any mental or physical impairment that would affect your ability to perform the essential duties of a judge? If so, please specify
Answer 30: [redacted]
31. To your knowledge, have you ever been disciplined for violation of any rules of professional conduct in any jurisdiction? In particular, have you ever received any discipline, formal or informal, including an "Informal Admonition." If so, when, and please explain.
Answer 31: [redacted]
32. Have you ever been convicted of any misdemeanor or felony other than a minor traffic offense?
Answer 32: [redacted]
33. Have you ever had a DWI or any criminal charge, other than a minor traffic offense, filed against you? If so, when? What was the outcome?
Answer 33: [redacted]
34. Have you ever been a named party in any lawsuit in either your personal or professional capacity? If so, please explain the nature of the lawsuit(s) and the result(s).
Answer 34: Yes. I was named as the respondent in an uncontested divorce proceeding, which resulted in the dissolution of my first marriage.
35. To your knowledge, is there any circumstance in your professional or personal life that creates a substantial question as to your qualifications to serve in the judicial position involved or which might interfere with your ability to so serve?
Answer 35: No.
36. If you have served as a judge in New Mexico, have you ever been the subject of charges of a violation of the Code of Judicial Conduct for which a public filing has occurred in the New Mexico Supreme Court, and if so, how was it resolved?
Answer 36: No.
37. If you have served as a judge in New Mexico, have you ever participated in a Judicial Performance Evaluation, including interim, and if so, what were the results?
Answer 37: Yes. I recently participated in a JPEC interim evaluation. Retention recommendations are not included in these interim evaluations. I performed strongly on my interim evaluation and am addressing areas of growth.
38. Have you filed all federal, state and city tax returns that are now due or overdue, and are all

tax payments up to date? If no, please explain.

Answer 38: Yes.

39. Have you or any entity in which you have or had an interest ever filed a petition in bankruptcy, or has a petition in bankruptcy been filed against you? If so, please explain.

Answer 39: No.

40. Are you presently an officer, director, partner, majority shareholder or holder of a substantial interest in any corporation, partnership or other business entity? If so, please list the entity and your relationship:

Answer 40: No.

41. Do you foresee any conflicts under the NM Code of Judicial Conduct that might arise regularly? If so, please explain how you would address these conflicts.

Answer 41: No.

42. Do you meet the constitutional qualifications for age, residency, and years of practice for the judicial office for which you are applying? Please explain.

Answer 42: Yes. I am over thirty-five years old, I have been in the actual practice of law for over ten years, and I have resided in New Mexico for at least the past three years.

43. Please explain your reasons for applying for a judicial position and what factors you believe indicate that you are well suited for it.

Answer 43:

I am applying for a position on the New Mexico Court of Appeals because of my love of the law and my community. This position offers me the opportunity to serve the State of New Mexico in a capacity I feel particularly well-suited for. While I have immensely enjoyed my time as a district court judge, I believe I can better serve my community as an appellate judge—immersing myself in discrete areas of the law and crafting well-reasoned and legally-sound decisions. During my tenure on the district court bench, I have proved myself to be a smart, hard-working, and effective judge. From this experience as well as my other professional experiences, I possess certain qualities that have served me well on the bench and make me well-suited to serve as a court of appeals judge. I bring to the bench a breadth of legal experience, an unwavering work ethic, a curious legal mind, and a temperament well-suited for the bench.

BREADTH OF EXPERIENCE

While on the bench, I have effectively administered large and unwieldy dockets. As the Division IX judge, I managed a civil docket of over 1,000 cases, primarily in Santa Fe County. Although I was only on the bench for approximately three months, I undertook a full docket review and held numerous motions hearings and trials involving a wide range of legal issues. I left my successor a well-organized docket, without backlog. Since I returned to the Court as the Division V judge, I have been responsible for a mixed docket of civil, criminal, and family law cases spanning all three counties of the First Judicial District. During my tenure on the bench, I have held scores of trials, evidentiary hearings, dispositive motions hearings, discovery motions hearings, and scheduling and status conferences in a wide-variety of subject matters.

In private practice, I spent my time as a litigator and appellate attorney. Instead of focusing on a given area of law, I worked on a variety of civil and criminal cases for individuals and entities on behalf of both plaintiffs and defendants. I have worked at a large law firm in Washington, D.C., alongside some of the most demanding lawyers in the country. I had the pleasure of working at Long, Pound & Komer, upon my move back home to New Mexico. Prior to taking the bench, I worked for myself, alongside my law partner and husband, and maintained a diverse practice.

WORK ETHIC

I am, and have always been, a very hard worker, and I strive for excellence. This is who I am as an individual and a judge. On the bench, I have worked tirelessly for the parties who appear before me. For every hearing I hold, I review the briefing closely, read all the relevant case law, undertake my own research, and prepare questions for the litigants who appear before me so that I can issue thoughtful, well-reasoned decisions. I have set aside significant time to conduct trials on the backlog of older cases that existed when I assumed the bench. Beyond this, I have worked diligently to ensure the cases on my docket receive the attention they need. When I assumed Division V, my docket consisted of over 2,000 cases (by comparison, the average caseload in the First Judicial District is less than 1,000 cases). Through unyielding hard work, and with the help of my staff, I have reduced my docket to fewer than 1,000 cases.

ANALYTICAL ABILITY

No matter the age or breadth of experience of a judge, there always will be those cases that present novel issues. I truly enjoy being a judge and immersing myself in new areas of law, and I am able to master these areas of the law quickly. During my time on the bench, I have been presented with challenging legal questions and issues not yet addressed by our appellate courts. I possess the tools and analytic ability to research and understand the law in any given case—looking outside the State of New Mexico as needed, applying this law to the facts of the case, and issuing sound decisions based on the rule of law. I am very excited at the prospect of devoting my time on the appellate bench to tackling legal issues in all types of cases and writing well-reasoned decisions.

TEMPERAMENT

After serving as a judge, I have a much clearer view of what it means to possess a temperament appropriate for the bench. A judge, of course, must be a good listener, open-minded, patient, and decisive. These are characteristics I possess and honed while on the bench. Perhaps just as important is a judge's ability to balance a litigant's right to be heard with the court's need to maintain order and stay on schedule. I found that, by taking the time to thoroughly understand the issues in each case, I respectfully could keep the litigants focused, thereby maintaining order and staying on schedule. I believe my temperament and docket management skills I have developed on the bench would serve me well on the Court of Appeals.

In conclusion, it has been a true privilege and pleasure to serve as a district court judge. It would be an honor to be entrusted to serve the State of New Mexico as a court of appeals judge, and I greatly appreciate your consideration. I would like to thank the members of the Judicial Nominating Commission for your willingness to serve as volunteers in reviewing applications and making recommendations to the Governor.

44. Does submission of this application express your willingness to accept judicial appointment to the New Mexico Court of Appeals if your name is chosen by the Governor?

Answer 44: Yes.

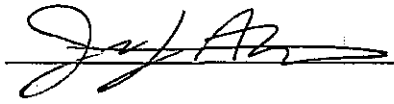
Items to be Submitted in Separate Document(s)

1. Please have **at least two, but not more than five,** letters of recommendation submitted directly to The Chair of the Judicial Selection Commission. Include letters from one or more professional adversaries. **If more than five letters are submitted, only the first five received will be submitted to the Commission.** Letters of recommendation may be scanned to be part of the application; however, **the original letters must be mailed directly from the source to the Judicial Selection Office.**
2. Please attach a list of no more than eight (8) references.
3. Please enclose **one** legal writing sample, such as a legal memorandum, opinion, or brief. If you had assistance from an associate, clerk or partner, indicate the extent of such assistance. Please submit no more than 20 pages.
4. You may also attach a copy of **one** other publication you have written which you feel would be relevant to the Commission's consideration of your qualifications. For this too, please submit no more than 20 pages. If you include more than one additional publication, only one will be presented for the Commission's review. The others will be retained on file with the rest of your application materials.
5. If you have, currently or in the past, suffered from any mental, physical or other condition that would affect your ability to perform the essential duties of a judge, and which has not been disclosed above, please describe the nature of such condition and your treatment and explain how it would affect your service. You may answer this request, as well as Questions 29 and 30, by submission of a separate confidential letter. If you wish the letter to remain confidential, please mark "CONFIDENTIAL" at the top of the first page of the letter. The information will be made available to each commissioner and otherwise hold the information confidential to the extent allowed by law.

[Instructions: All of the answers stated in this application must be affirmed as true under penalty of perjury, by self-affirmation.]

AFFIRMATION

The undersigned hereby affirms that he/she is the person whose signature appears herein on this application for judicial appointment; that he/she has read the same and is aware of the content thereof; that the information that the undersigned has provided herein is full and correct according to the best knowledge and belief of the undersigned; that he/she has conducted due diligence to investigate fully each fact stated above; that he/she executed the same freely and voluntarily; that he/she affirms the truth of all statements contained in this application under penalty of perjury; and that he/she understands that a false answer may warrant a referral to the Disciplinary Board or other appropriate authorities.

/s/:  Date: 08/16/2017

Writing Sample # 1

(Summary Judgment Decision issued on 10/3/2016)

STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT

GABRIELLE KNEALE,

Appellant/Plaintiff,

v. Case No. D-101-CV-2013-03095

NEW MEXICO CHILDREN, YOUTH AND FAMILIES DEPARTMENT, an agency of the State of New Mexico; YOLANDA BERUMEN-DEINES, Cabinet Secretary and JOHN SWEENEY, Deputy Director of Juvenile Justice Services,

Appellees/Defendants.

DECISION GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S NEW MEXICO WHISTLEBLOWER PROTECTION ACT CLAIM

THIS MATTER came before the Court on *Defendants' Motion for Summary Judgment on Plaintiff's New Mexico Whistleblower Protection Act Claim* ("Motion"), filed June 15, 2016. The Court having reviewed the Motion, Plaintiff's Response to the Motion, Defendants' Reply, Plaintiff's Surreply, and Defendants' Surreply, the Court having heard argument of counsel at the August 1, 2016 hearing, and otherwise being fully advised in the premises, finds for the following reasons that the Motion is well taken and should be GRANTED.

Defendants move for summary judgment on Plaintiff's New Mexico Whistleblower Protection Act ("NMWPA"), NMSA 1978, §§ 10-16C-1 to -6 (2010), claim, pursuant to Rule 1-056 NMRA, on two grounds: (1) that Plaintiff is collaterally estopped from raising a NMWPA claim because of the State Personnel Board's unchallenged decision that Plaintiff was terminated for "just cause"; and (2) that Plaintiff cannot meet her burden under Rule 1-056 that a protected

communication was a contributing factor in her termination.[1] The Court previously ruled that Plaintiff's NMWPA claim was not barred by the doctrine of collateral estoppel.[2] (*See* Order, filed Aug. 25, 2016.) This Decision, therefore, addresses Defendants' second basis for seeking summary judgment.

FACTUAL BACKGROUND[3]

Plaintiff was hired by New Mexico Children, Youth and Families Department (CYFD) on February 20, 2010, as a Probation Officer & Corrections Treatment Officer (also referred to as a grievance officer) at the Camino Nuevo facility. (DUMF No. 1; PUMF No. 1.) The grievance officer position held by Plaintiff was created pursuant to an agreement between CYFD and ACLU-NM. (PUMF No. 1.) During her time as a grievance officer, Plaintiff submitted

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[1] Plaintiff's *Notice of Appeal and Complaint for Damages and Injunctive Relief*, filed December 5, 2013, raises four claims for relief. First, Plaintiff appealed the State Personnel Board's decision affirming her dismissal—this claim was voluntarily dismissed by Plaintiff on June 2, 2016. (*Order Dismissing Appeal of Administrative Decision* ("Admin Dismissal Order"), filed Jun. 2, 2016.) Second, Plaintiff raised a claim for breach of contract—this claim was voluntarily dismissed by Plaintiff on June 10, 2016. (*Order Dismissing Breach of Contract Claim*, filed Jun. 10, 2016.) Third, Plaintiff raised a claim for breach of the covenant of good faith and fair dealing—the Court entered summary judgment for Defendants on this claim on August 25, 2016. (Order, filed Aug. 25, 2016.) Fourth, Plaintiff raised a claim for retaliatory action in violation of the NMWPA, which is the subject of this Decision. The Court also previously ruled that Defendant Yolanda Berumen-Deines could not be sued in her individual capacity and that Defendant John Sweeney should be dismissed from the case. (Order, filed Aug. 26, 2016.)

[2] Defendants petitioned for an interlocutory appeal of the Court's decision on the collateral estoppel issue. (*See Petition for Interlocutory Appeal of Denial of Motion for Summary Judgment on Grounds of Collateral Estoppel*, filed Aug. 29, 2016.) Because the Court grants Defendants' Motion on other grounds and summary judgment is entered for Defendants on Plaintiff's remaining claim, Defendants' Petition is moot and denied as such.

[3] The Court provides basic background facts in this section; further factual details are discussed where appropriate in the Analysis section below. These facts, and those set forth throughout this Decision, are drawn from Plaintiff's Undisputed Material Facts (PUMF), as set forth in Plaintiff's Response at 6-17, and Defendants' Undisputed Material Facts (DUMF), as set forth in the Motion at 3-9, to which Plaintiff does not dispute. While the parties dispute some facts in the Motion and Response, none of these disputes are material to the determination of Defendants' Motion.

weekly grievance logs to her direct supervisor. (PUMF Nos. 11, 12, 16.) In March 2012, Plaintiff sent an email to her supervisor Michelle George, in which she communicated concerns, and Plaintiff filed an internal complaint against Ms. George. (PUMF Nos. 23, 24.)

On April 3 and 4, 2012, Plaintiff had contact with client R.M., a juvenile sex offender in state custody. (DUMF No. 7 (relevant portion undisputed by Plaintiff (*see* Response at 4).)[4] On April 3, 2012, Plaintiff met with client R.M. in the facility's multipurpose room for approximately 25 minutes, during which time R.M. hugged Plaintiff twice. (DUMF No. 8.) On April 4, 2012, Plaintiff approached R.M. who was sitting with his legs apart and brushed one of his legs aside so she could sit between R.M.'s legs. (DUMF No. 9.) Plaintiff sat in this position for approximately ten minutes, during which time R.M.'s legs were at times touching Plaintiff's legs, R.M. placed his hands on Plaintiff's shoulders three times, at two points moving his face within inches of Plaintiff's face, R.M. reached down to Plaintiff's lap and picked up the badge attached on a lanyard around Plaintiff's neck, and R.M. twice grabbed his t-shirt between his thumbs and forefingers and pulled outward indicating large breasts. (*Id.*) During this time, Plaintiff made no attempt to get away from R.M. or to signal her disapproval of R.M.'s actions. (*Id.*) Plaintiff's conduct with R.M. on April 4, 2012 was reported by a co-worker to a supervisor. (DUMF No. 11.) On April 5, 2012, Plaintiff was placed on no client contact. (DUMF No. 14; PUMF No. 25.)

When being investigated for the April 4, 2012 incident, Plaintiff was shown a video of the incident. (DUMF No. 12.) Plaintiff insisted the video was misleading and that further

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[4] The majority of DUMFs recite factual findings made by the Administrative Law Judge (ALJ) who heard Plaintiff's appeal to the State Personnel Board (SPB) of CYFD's termination decision. Plaintiff does not dispute that the ALJ made these findings, nor does she dispute the factual findings themselves, (*see* Response at 4-5); moreover, Plaintiff dismissed her appeal of the SPB decision affirming her termination, (*see* Admin Dismissal Order).

examination of the video would show that R.M. had approached her after she sat down. (*Id.*) When Plaintiff was shown a longer version of the video, Plaintiff admitted she was the one who had approached R.M. and sat between his legs. (*Id.*) On April 25, 2012, Plaintiff disclosed to a co-worker that Plaintiff was under investigation and that the co-worker could expect to be interviewed because she had been identified as a witness. (DUMF No. 14.)

On June 14, 2012, Plaintiff was served with a Notice of Contemplated Action. (DUMF No. 2.) On July 19, 2012, Plaintiff was served a Notice of Final Action (NFA), dismissing her from employment with CYFD.[5] (*Id.* (citing NFA, attached as Def. Ex. 1 to Motion, at 3-7).) There were three reasons provided in the NFA for Plaintiff's termination: (1) misuse of authority or responsibility by crossing professional boundaries with client R.M. on April 3 and 4, 2012; (2) breach of confidentiality by disclosing confidential information about the investigation of Plaintiff to a co-worker on April 26, 2012;[6] and (3) failure to cooperate with the investigation by not providing truthful information regarding the events of April 4, 2012. (Def. Ex. 1 at 4-5.) Plaintiff filed a Notice of Appeal of the NFA on August 15, 2012. (DUMF No. 3.) After discovery, a hearing before an Administrative Law Judge (ALJ), and submissions of closing statements and proposed findings of fact and conclusions of law, the ALJ concluded that CYFD had proved by a preponderance of the evidence that it had just cause to terminate Plaintiff. (DUMF No. 16.) On November 5, 2013, the State Personnel Board (SPB) entered its decision adopting and incorporating the ALJ's findings of fact and conclusions of law, and affirmed the dismissal of Plaintiff. (DUMF No. 20.) Plaintiff filed a *Notice of Appeal and Complaint for*

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[5] Plaintiff had been previously disciplined during her tenure at CYFD. Plaintiff received a Letter of Reprimand on January 12, 2012, for the use of profanity and inappropriate language in front of other CYFD employees. (PUMF No. 17 (citing Pl. Ex. 36).)

[6] There is a discrepancy in the date on which Plaintiff breached confidentiality—the NFA states April 25, 2012, (Def. Ex. 1 at 4), and the ALJ decision states April 26, 2012, (*id.* at 12).

Damages and Injunctive Relief, which initiated this lawsuit, on December 5, 2013. On May 27, 2016, Plaintiff filed an *Unopposed Motion to Dismiss Appeal of Administrative Decision*, and on June 2, 2016, the Court entered an Order dismissing Plaintiff's Appeal.

LEGAL STANDARD

The general standard applicable to summary judgment in New Mexico is well-known and oft-repeated. "Summary judgment is appropriate when 'there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.'" *Smith v. Durden*, 2012-NMSC-010, ¶ 5, 276 P.3d 943 (quoting Rule 1-056 NMRA). The Court "view[s] the facts in the light most favorable to the party opposing the summary judgment and indulge[s] all reasonable inferences in favor of a trial on the merits." *Smith*, 2012-NMSC-010, ¶ 5 (citing *Romero v. Philip Morris Inc.*, 2010-NMSC-035, ¶ 7, 148 N.M. 713).

The particular summary judgment standard applicable to claims under the NMWPA, however, has yet to be addressed by our appellate courts. The Court finds for the reasons below that the burden-shifting framework employed by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973), should apply to Plaintiff's NMWPA claim.[7] New Mexico appellate courts have applied this framework to employment

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[7] Plaintiff advocates instead for the adoption of the framework applicable to the federal Whistleblower Protection Act (WPA), Pub. L. No. 101-12, 103 Stat. 16 (codified at various sections of 5 U.S.C. (1994)). (Response at 28.) The Court finds this argument unconvincing as Congress adopted and implemented an administrative review process for WPA claims, along with setting burdens of proof, through statute. *See* 5 U.S.C. § 1221 (establishing review of WPA claim by the Merit System Protection Board and requiring employer to demonstrate by clear and convincing evidence that it would have taken the same personnel action in the absence of a protected disclosure). No such statutory provisions exist in the NMWPA.

Plaintiff also mentions the use of a "mixed motive" analysis, instead of the *McDonnell Douglas* framework. (Response at 28.) However, "[a] mixed-motive case is not established . . . until the plaintiff presents evidence that ***directly*** shows that retaliation played a motivating part in the employment decision at issue. . . . Thus, the plaintiff must present evidence of conduct or statements by persons involved in the decisionmaking process that may be viewed as directly

discrimination and retaliation claims in other contexts. *See, e.g., Juneau v. Intel Corp.*, 2006-NMSC-002, ¶ 9, 139 N.M. 12 (applying *McDonnell Douglas* framework to New Mexico Human Rights Act, NMSA 1978, §§ 28-1-1 to -15 (1969), claim); *Gonzales v. New Mexico Dep't of Health*, 2000-NMSC-029, ¶¶ 21-22, 129 N.M. 586 (discussing *McDonnell Douglas* framework in context of retaliation claim). Moreover, the plain language of the NMWPA supports the use of the *McDonnell Douglas* framework. The NMWPA provides the employer with an affirmative defense to a whistleblower claim if the employer can show, *inter alia*, the adverse employment action was due to the employee's misconduct or for other legitimate business purpose. *See* § 10-16C-4(B). This provision tracks the second prong of the *McDonnell Douglas* framework. Finally, federal courts construing the NMWPA have applied the *McDonnell Douglas* framework at the summary judgment stage. *See, e.g., Lobato v. New Mexico Env't Dep't*, 733 F.3d 1283, 1297 (10th Cir. 2013) (applying *McDonnell Douglas* analysis to NMWPA claim); *Valencia v. City of Santa Fe*, No. CV 12-137 JCH/WPL, 2014 WL 11430907, at *8 (D.N.M. Feb. 25, 2014) (unpublished) (same).[8]

The Court concludes that Plaintiff's NMWPA claim should be analyzed under the *McDonnell Douglas* framework. "Under the *McDonnell Douglas* analysis, if a plaintiff employee (1) establishes a prima facie case of protected whistleblowing, then (2) the burden

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reflecting the alleged retaliatory attitude." *Twigg v. Hawker Beechcraft Corp.*, 659 F.3d 987, 999-1000 (10th Cir. 2011) (internal quotation marks, citations and alterations omitted) (emphasis added). As set forth below, Plaintiff has presented no evidence that directly reflects the alleged retaliatory motive, and, as such, the mixed motive test is not appropriate in this case.

[8] In addition, courts construing similar state whistleblower protection acts utilize the *McDonnell Douglas* framework. *See LaFond v. Gen. Physics Servs. Corp.*, 50 F.3d 165 (2d Cir. 1995) (applying *McDonnell Douglas* framework to Connecticut whistleblower statute); *Whitaker v. U.S. Security Assocs., Inc.*, 774 F. Supp. 2d 860 (E.D. Mich. 2011) (same with regard to Michigan statute); *Stevens v. St. Louis Univ. Med. Ctr.*, 831 F. Supp. 737 (E.D. Mo. 1993) (same with regard to Missouri statute); *Rosen v. Transx Ltd.*, 816 F. Supp. 1364 (D. Minn. 1993) (same with regard to Minnesota statute).

shifts to the defendant employer to articulate a legitimate, non-discriminatory reason for having made adverse employment decisions regarding the plaintiff." *Valencia*, 2014 WL 11430907, at *8 (citing *McDonnell Douglas*, 411 U.S. at 802-05). "If the defendant meets its burden, all presumptions of retaliation are dropped, and (3) the burden shifts back to the plaintiff to show by a preponderance of the evidence that the defendant's proferred [sic] reasons for the allegedly retaliatory actions are merely a pretext for retaliatory discrimination." *Id.* "'Although intermediate evidentiary burdens shift back and forth under this framework, the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.'" *Gonzales*, 2000-NMSC-029, ¶ 21 (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000) (alteration omitted)).

ANALYSIS

Defendants move for summary judgment on Plaintiff's NMWPA claim, arguing that Plaintiff has not met her prima facie burden; and, even if she had, that Plaintiff has failed to show that Defendants' proffered reason for Plaintiff's termination was pretext. The Court agrees.

A. Prima Facie Case

"To establish a prima facie case in a retaliation claim, the plaintiff must prove: (1) she engaged in a protected activity, (2) she was subject to adverse employment action, and (3) a causal connection existed between the protected activity and the adverse employment action." *Gonzales*, 2000-NMSC-029, ¶ 22 (citing *Jeffries v. Kansas*, 147 F.3d 1220, 1231 (10th Cir. 1998)).

1. Protected Activity

The NMWPA, in relevant part, makes it unlawful for "[a] public employer to take any retaliatory action against a public employee because the public employee . . . communicates to

the public employer or a third party information about an action or a failure to act that the public employee believes in good faith constitutes an unlawful or improper act." § 10-16C-3(A). "Unlawful or improper act" in turn is defined as "a practice, procedure, action or failure to act on the part of a public employer that . . . violates . . . a state law, a state administrative rule or a law of any political subdivision of the state" or "constitutes . . . an abuse of authority." § 10-16C-2(E).

The scope of communications covered under the NMWPA was briefly addressed in *Wills v. Board of Regents of the University of New Mexico*, 2015-NMCA-105, 357 P.3d 453, in which the Court of Appeals held that communications regarding personal personnel grievances were not covered under the NMWPA. *Id.* ¶¶ 20-21. Other than *Wills*, our appellate courts have had little occasion to address the types of communications that are covered under the NMWPA. "'When New Mexico cases do not directly answer the question presented, we look for guidance in analogous law in other states or the federal system.'" *Wills*, 2015-NMCA-105, ¶ 19 (quoting *CIT Grp./Equip. Fin., Inc. v. Horizon Potash Corp.*, 1994-NMCA-116, ¶ 6, 118 N.M. 665). The NMWPA was modeled after the federal Whistleblower Protection Act of 1989 ("WPA"), Pub. L. No. 101-12, 103 Stat. 16 (codified at various sections of 5 U.S.C. (1994)). *See* New Mexico Legislative Finance Committee, Fiscal Impact Report on House Bill 165, 3 (Feb. 9, 2010), available at www.legis.state.nm.us. "Accordingly, cases interpreting the federal whistleblower law have persuasive value in considering the legislative intent behind the [NMWPA]." *Wills*, 2015-NMCA-105, ¶ 19 (citing *Trujillo v. N. Rio Arriba Elec. Coop., Inc.*, 2002-NMSC-004, ¶ 8, 131 N.M. 607 (recognizing that, when New Mexico statutes are similar to their federal counterparts, appellate courts may rely on federal jurisprudence in construing legislative intent)). In construing the WPA, federal courts held that "disclosures made as part of normal duties

through normal channels" were not protected. *Kahn v. Dep't of Justice*, 618 F.3d 1306, 1313 (Fed. Cir. 2010); *see also Huffman v. Office of Pers. Mgmt.*, 263 F.3d 1341, 1352-55 (Fed. Cir. 2001); *Willis v. Dep't of Agric.*, 141 F.3d 1139, 1143-44 (Fed. Cir. 1998). Congress amended the WPA in 2012, through the Whistleblower Protection Enhancement Act of 2012 ("WPEA"), Pub. L. No. 112-199, 126 Stat. 1465, expanding the scope of protected disclosures to include normal duties/channels disclosures.[9]

The Court believes for a number of reasons that our appellate courts would adopt the line of federal cases that holds normal duties/channels communications are not protected. ***First***, the NMWPA was modeled after the WPA. *See* New Mexico Legislative Finance Committee, Fiscal Impact Report on House Bill 165, 3 (Feb. 9, 2010), available at www.legis.state.nm.us (stating that the NMWPA "may be seen as a mirror to the federal law named similarly. The Whistleblower Protection Act of 1989 is a United States federal law that protects federal whistleblowers, or persons who work for the government who report agency misconduct."). Moreover, the New Mexico legislature has not changed the NMWPA in response to the change in federal law through the WPEA. ***Second***, the NMWPA is more restrictive than either the WPA or the WPEA. Under federal statute, "***any disclosure*** of information by an employee . . . which the employee . . . reasonably believes evidences . . . any violation of any law, rule or regulation" is covered. 5 U.S.C. § 2302(a)(8)(A) (emphasis added). In contrast, the NMWPA only covers communications to the "***public employer***" or a "***third party***" of "information about an action or a failure to act that the public employee believes in good faith constitutes an unlawful or improper act." § 10-16C-3 (emphasis added). ***Third***, the policy rationale for construing the WPA

[9] The WPEA, however, maintains that disclosures made during the normal course of duties of an employee are only protected if a personnel action was made against the reporting employee in reprisal for the disclosure. 5 U.S.C. § 2302(f)(2).

restrictively is shared by our appellate courts. Federal courts interpreting the WPA have held that "[t]he WPA was established to protect employees who go above and beyond the call of duty and report infractions of law that are hidden." *Huffman*, 263 F.3d at 1353; *see also Willis*, 141 F.3d at 1144 (finding that "the WPA is intended to protect government employees who risk their own personal job security for the advancement of the public good by disclosing abuses by government personnel"). Similarly, our appellate courts have distinguished "'whistleblowing' that benefits the public by exposing unlawful and improper actions by government employees from communications regarding personal personnel grievances that primarily benefit the individual employee," holding that "[o]nly the former is protected by whistleblower protection laws." *Wills*, 2015-NMCA-105, ¶ 20 (citing, among other authorities, *Willis*, 141 F.3d 1139); *see also Garrity v. Overland Sheepskin Co. of Taos*, 1996-NMSC-032, ¶ 15, 121 N.M. 710 (holding that, "in cases involving discharge for reporting illegal activity, or 'whistleblowing,' employees must show that their actions furthered a public interest rather than a private one").

Plaintiff argues that certain communications she made, dating from September 2010 to March 2012, constitute protected communications about unlawful or improper acts. (Response at 25-27.) These communications fall broadly into two categories—(1) communications contained within weekly grievance logs Plaintiff provided to her supervisors at CYFD, and (2) an internal complaint Plaintiff filed against her supervisor in March 2012. The Court will address each category separately.

Weekly grievance logs. With respect to the weekly grievance logs, Plaintiff argues that she communicated with her supervisors about violations of administrative rules and abuses of authority—*e.g.*, separation/room confinement, staff retaliation against clients for using grievance

process, and impermissible use of mechanical restraints.[10] (Response at 25-27 (citing PUMF Nos. 11-14, 16-17, 23-24).) These purported "protected communications" are Plaintiff's "typed logs [that she provided] to [her] direct supervisor." (Ex. 1 ¶ 3.) Based on a plain reading of the NMWPA, none of these communications would fall within the definition of protected communications under the NMWPA as they were made to other CYFD employees and not to anyone who would qualify as a "public employer" or "third party."[11] § 10-16C-3. Moreover, from a review of the weekly logs, it is difficult to determine which statements in these logs resulted from a grievance made by a CYFD client or were policy violations identified by Plaintiff on her own initiative. (*See* Pl. Exs. 1A, 1B, 1C, 27.)[12] As it is Plaintiff's burden to make out a prima facie case, the Court finds Plaintiff's conclusory statement in her affidavit—that the logs "reflect a number of the issues I was raising about policy violations I observed"—insufficient. (Ex. 1 ¶ 4.) Regardless, the Court finds that these weekly grievance logs were made during the course of Plaintiff's normal duties and through normal channels. As such,

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[10] Plaintiff also argues that an incident in which CYFD staff locked her in a room with a client amounted to an abuse of authority. (Response at 27.) The Court finds that this incident does not rise to the level of an abuse of authority by a public employer, as required by Section 10-16C-2(E)(3).

[11] The NMWPA draws a clear distinction between "public employees" and "public employers." A "public employer" is defined in relevant part as "any department . . . of state government" and "every office or officer" of such department. § 10-16C-2(C); *see also Janet v. Marshall*, 2013-NMCA-037, ¶ 12, 296 P.3d 1253 (in determining whether an individual is an officer, the Court considers "whether the officer possesses 'a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public.'" (quoting *Lacy v. Silva*, 1972-NMCA-064, ¶ 5, 84 N.M. 43)). A "public employee" is defined in relevant part as "a person who works for . . . a public employer." § 10-16C-2(B). As such, Plaintiff's direct supervisors are not "public employers," as they do not possess a delegation of a portion of the sovereign power of government, and instead are "public employees" under the NMWPA. *Janet*, 2013-NMCA-037, ¶ 12. And, plainly, Plaintiff's direct supervisors are not "third parties" as they are "public employees" under the NMWPA.

[12] Plaintiff's Exhibit 27 was not addressed in Plaintiff's Affidavit (*see* Pl. Ex. 1), and is unsworn, inadmissible hearsay. *See infra* at 12-13.

under the definition of protected activity adopted by the Court above, these weekly logs do not constitute protected whistleblowing activity.

March 2012 Internal Complaint. With respect to the internal complaint Plaintiff filed against her supervisor in March 2012, the Court likewise finds that this is not a protected communication. On March 26, 2012, Plaintiff sent an email to her supervisor Michelle George, complaining about Ms. George's management of Plaintiff and identifying alleged policy violations. (PUMF No. 23 (citing Pl. Ex. 38).) On March 28, 2012, Plaintiff filed an internal complaint against her supervisor, alleging wrongdoing by Ms. George, including that Ms. George had allegedly retaliated against Plaintiff for reporting policy violations. (PUMF No. 24 (citing Pl. Ex. 40).) To the extent Plaintiff is simply complaining about Ms. George's management style and decisions, such communications are personal personnel grievances, which are not protected by the NMWPA. *Wills*, 2015-NMCA-105, ¶ 20. And, for the reasons stated above, the communications regarding purported policy violations are normal duty/channel communications and are not protected.

With respect to the statements contained in Plaintiff's Exhibits 38 and 40 that Ms. George was purportedly retaliating against Plaintiff for reporting policy violations by not permitting medical leave and by changing job duties, these statements are unsworn hearsay and will not be considered by the Court. *Marquez v. Gomez*, 1991-NMCA-066, ¶ 20, 116 N.M. 626 ("find[ing] no abuse of discretion on the part of the trial court in its refusal to consider the submission of unsworn statements and reports submitted by plaintiffs in their response to defendants' motions for summary judgment"); *see also Seal v. Carlsbad Indep. Sch. Dist.*, 1993-NMSC-049, ¶ 14, 116 N.M. 101 ("[H]earsay is not generally admissible at trial, so affidavits or depositions containing hearsay are not sufficient evidence of a fact."). Plaintiff offers no admissible

evidence substantiating these unsworn, hearsay statements—they are not mentioned in her sworn affidavit (Pl. Ex. 1), nor does she cite to any deposition testimony. Moreover, there is no admissible evidence in the record as to who these communications were provided to and whether such individuals would be considered "public employers" or "third parties" under Section 10-16C-3. Counsel's statements that the March 28, 2012 Internal Complaint was directed to the Cabinet Secretary and rerouted to Defendant John Sweeney, (Plaintiff's Surreply at 6), are not enough. *Archuleta v. Goldman*, 1987-NMCA-049, ¶ 12, 107 N.M. 547 (unsworn statements of counsel in briefs are not evidence for purposes of establishing a disputed issue of material fact incident to a motion for summary judgment). For the foregoing reasons, the March 2012 internal complaint is not a protected communication and will not be considered by the Court.

2. Adverse Employment Action

"[I]t is undisputed that [Plaintiff] was subjected to an adverse employment action through her termination." (Reply at 25; *see also* Response at 29 (referring to "firing decision" as the adverse employment action).)

3. Causal Connection

Even if the Court were to assume that some of the communications identified by Plaintiff constituted protected activity under the NMWPA, Plaintiff still fails to make a prima facie case because she has not established a causal connection between her communications and the adverse employment action. "[A] causal connection is established where the plaintiff presents evidence of circumstances that justify an inference of retaliatory motive, such as protected conduct closely followed by adverse action." *MacKenzie v. City & Cty. of Denver*, 414 F.3d 1266, 1279 (10th Cir. 2005) (internal quotation marks omitted). "Unless there is very close temporal proximity between the protected activity and the retaliatory conduct, the plaintiff must

offer additional evidence to establish causation." *O'Neal v. Ferguson Const. Co.*, 237 F.3d 1248, 1253 (10th Cir. 2001); *see also Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1179 (10th Cir.1999) (holding that a "three-month period, standing alone, is insufficient to establish causation"). Plaintiff presents several arguments to support her claim that she was terminated as a result of protected communications.

Temporal Proximity. First, Plaintiff argues that temporal proximity supports her prima facie case. (Response at 29-30.) There, however, was approximately four months between Plaintiff's last alleged "protected communication" (March 28, 2012) and her termination (July 19, 2012); this standing alone is insufficient to establish causation. *Anderson*, 181 F.3d at 1179. Moreover, the primary basis provided by Defendants for Plaintiff's termination was the incident involving client R.M. on April 3 and 4, 2012. (Def. Ex. 1 at 4.) This is a legitimate, non-discriminatory reason for Plaintiff's termination. *See infra* at 18. "[E]vidence of temporal proximity has minimal probative value in a retaliation case where intervening events between the employee's protected conduct and the challenged employment action provide a legitimate basis for the employer's action." *Twigg v. Hawker Beechcraft Corp.*, 659 F.3d 987, 1001-02 (10th Cir. 2011). In this case, the incident with R.M. occurred ***after*** Plaintiff's purported "protected communications" and ***before*** her termination; such intervening events undermine Plaintiff's temporal-proximity argument. In sum, there is insufficient temporal proximity to establish causation.

Inconsistent Reasons for Termination. Plaintiff next argues that Defendants offered inconsistent or differing reasons for her termination. (Response at 30.) There were three reasons provided in the NFA for Plaintiff's termination: (1) misuse of authority or responsibility by crossing professional boundaries with client R.M. on April 3 and 4, 2012; (2) breach of

confidentiality by disclosing confidential information about the investigation of Plaintiff to a co-worker on April 26, 2012; and (3) failure to cooperate with the investigation by not providing truthful information regarding the events of April 4, 2012. (Def. Ex. 1 at 4-5.) None of the purported "inconsistent" reasons cited by Plaintiff are in fact inconsistent—they support the conclusion by CYFD that Plaintiff crossed professional boundaries with clients on more than one occasion. (Response at 30.) Even assuming, *arguendo*, that Plaintiff had offered inconsistent rationales for the termination, "[i]nconsistency evidence . . . has traditionally been associated with proving *pretext* not as direct evidence of an employer's retaliatory animus." *Twigg*, 659 F.3d at 1002.

Comparator Evidence. Plaintiff next argues that other employees who engaged in misconduct were treated more leniently. Comparator evidence most frequently comes up in the context of whether a plaintiff can show that a defendant's stated reasons for the adverse employment action are pretextual. In that context, a plaintiff may show pretext "by providing evidence that he was treated differently from other similarly-situated, nonprotected employees who violated work rules of comparable seriousness. An employee is similarly situated to the plaintiff if the employee deals with the same supervisor and is subject to the 'same standards governing performance evaluation and discipline.'" *Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d 1220, 1232 (10th Cir. 2000) (quoting *Aramburu v. Boeing Co.*, 112 F.3d 1398, 1404 (10th Cir. 1997)).

Plaintiff sets out five instances where other CYFD employees purportedly engaged in wrongdoing but were disciplined more leniently than Plaintiff. (PUMF Nos. 30-34.) Plaintiff does not establish that these employees dealt with the same supervisor as Plaintiff. *See Kendrick*, 220 F.3d at 1232. Moreover, the instances Plaintiff points to are either not of a

comparable nature or not of comparable seriousness, (PUMF Nos. 30-33), and thus cannot be used to prove causation or show pretext. *See id.* Indeed, there is only one instance in which another employee is alleged to have had ***physical*** contact with a client; and, in that case, the contact was not sexual in nature. (PUMF No. 34.) In that instance, the employee touched or slapped two clients' necks or heads with her hand. (*Id.*) This incident occurred almost one year before Plaintiff's termination, which weakens its evidentiary value. *Kendrick*, 220 F.3d at 1234. Moreover, there is no suggestion that this employee hindered the investigation or breached confidentiality, which further weakens its evidentiary value. *Id.* at 1233. This "comparable" instance is insufficient to establish Plaintiff's prima facie case or to show pretext.

Procedural Irregularity. Plaintiff next argues that the usual agency practice of reviewing comparators before imposing discipline was not followed in Plaintiff's case. (Response at 31-32 (citing PUMF No. 29).) "For this argument to succeed, [Plaintiff] must show, first, that [CYFD] had such a policy, and second that [CYFD] did not follow that policy when dismissing [Plaintiff]." *Lobato*, 733 F.3d at 1289. Plaintiff does not point to any written policy that mandated CYFD to consider "comparable" disciplinary actions, and Plaintiff cites to no testimony of any CYFD employee that states there was a mandatory policy to consider such "comparable" disciplinary actions. As such, Plaintiff has failed to show that CYFD had such a policy, and her procedural irregularity argument is without merit. Moreover, even if Plaintiff had shown there were procedural irregularities in her dismissal—which she has not—"such irregularities do not directly demonstrate an employer's retaliatory motive." *Twigg*, 659 F.3d at 1003. "Deviation evidence can do no more than permit a reasonable inference that the employer acted with an ulterior motive and . . . engineered and manufactured the reasons it proffered for terminating the employer's employment, thereby suggesting retaliation only *indirectly*." *Id.*

(internal quotation marks, citations and alterations omitted).

Lying in wait. Plaintiff next argues that high-level CYFD officials were moving toward terminating her on other grounds before the incident involving client R.M. on April 3 and 4, 2012, and that this proves causation or pretext. (Response at 32 (citing PUMF Nos. 18, 20-21, 15).) There is nothing in the exhibits cited by Plaintiff to support this proposition. The exhibits, instead, show that Plaintiff had previously been investigated for overstepping her job duties, that these investigations were completed, and that termination of Plaintiff was not considered as a result of these investigations. (*See* Pl. Exs. 1, 22, 32, 33, 37.) Moreover, these investigations occurred ***before*** Plaintiff filed her March 2012 internal complaint (described by Plaintiff as her most formal whistleblowing complaint), which their evidentiary value. (Response at 25.) This argument and evidence thus does not support causation or pretext.

Corporate culture. Finally, Plaintiff argues that there was a culture in place at CYFD in which there was a distinction between grievance officers hired pursuant to the ACLU litigation and other CYFD employees, and that this somehow shows pretext. (Response at 32-33 (citing PUMF Nos. 1-3, 5-7, 36).) Again, the exhibits cited by Plaintiff do not support a finding that there was a system-wide corporate culture against her. Instead, the majority of the exhibits simply provides background information for the ACLU litigation and suggests there was some staff anxiety surrounding this. (*See* Pl. Exs. 2, 3, 9, 14, 15, 16, 17, 18, 54.) Two exhibits do indicate that staff had to be reminded—upon Plaintiff's complaint—not to interfere with Plaintiff's duties and to let her speak with staff and clients. (Pl. Exs. 10, 19.) This incident, which occurred in June 2010 (over two years before Plaintiff's termination), reflects that staff, not management, may have had difficulty with the grievance officer position, and shows that management took steps to remediate this. As such, these exhibits do not evidence any wide-

spread, discriminatory animus held by management against Plaintiff. This argument and evidence does not support causation or pretext.

B. Legitimate Non-Discriminatory Reason

As detailed above, Plaintiff has failed to make a prima facie case of her whistleblower claim. Even assuming, *arguendo*, that Plaintiff had met her initial burden, Defendants have put forth legitimate, non-discriminatory reasons for her termination. Namely, there were three reasons provided in the NFA for Plaintiff's termination: (1) misuse of authority or responsibility by crossing professional boundaries with client R.M. on April 3 and 4, 2012;[13] (2) breach of confidentiality by disclosing confidential information about the investigation of Plaintiff to a co-worker on April 26, 2012; and (3) failure to cooperate with the investigation by not providing truthful information regarding the events of April 4, 2012. (Def. Ex. 1 at 4-5.) Plaintiff appealed the NFA to the SPB, contesting her dismissal and requesting a hearing by an ALJ. (*Id.* at 2.) The ALJ found that CYFD had "just cause" to impose the discipline of dismissal on Plaintiff. (*Id.* at 24.) The SPB affirmed the ALJ decision. (DUMF No. 20.) Plaintiff originally appealed the SPB's final decision, but then dismissed her administrative appeal. (Admin Dismissal Order, filed Jun. 2, 2016.) While the Court declined to give preclusive effect to the SPB's decision to extinguish Plaintiff's NMWPA claim, *see supra* at 2, Defendants' proffered legitimate, non-discriminatory rationales for the termination—that were affirmed by the SPB—are more than sufficient to shift the burden back to Plaintiff to show that the proffered reasons were pretextual.

C. Pretext

"The employer's articulation of a legitimate, nondiscriminatory reason for the adverse employment action causes the presumption of discrimination attendant to the prima facie

[13] The ALJ found that Plaintiff's conduct on April 3, 2012 did not violate CYFD policies or amount to a misuse of authority or responsibility. (Def. Ex. 1 at 16.)

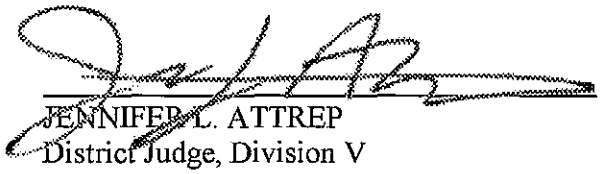
showing of discrimination 'to simply drop[] out of the picture.'" *Timmerman v. U.S. Bank, N.A.*, 483 F.3d 1106, 1113 (10th Cir. 2007) (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993)). "The employee then has the full burden to show that the employer discriminated on the basis of [retaliation for whistleblowing]. The employee may do so by . . . showing that the proffered reason is a pretext for illegal discrimination . . . ." *Timmerman*, 483 F.3d at 1113 (internal quotation marks, citations and alterations omitted). "An employee may show pretext based on weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's claimed legitimate, non-discriminatory reason such that a rational trier of fact could find the reason unworthy of belief. Demonstrating pretext enables a plaintiff to survive summary judgment." *Id.* (internal quotation marks and citations omitted). As discussed above, Plaintiff put forth various arguments in an attempt to show causation and pretext. None of these were sufficient to meet Plaintiff's initial prima facie burden of showing a causal connection between the adverse employment action and protected activity and, likewise, are insufficient to prove pretext. As such, Plaintiff's NMWPA claim fails.

CONCLUSION

For all the foregoing reasons, the Court finds that Plaintiff has failed to make a prima facie case of retaliation for whistleblowing, Defendant has set forth legitimate, non-discriminatory reasons for Plaintiff's termination, and Plaintiff has not shown that these reasons were pretextual. Accordingly, there are no genuine issues of material fact in dispute, and Defendants are entitled to summary judgment on Plaintiff's NMWPA claim. As all of Plaintiff's claims have been disposed of, this case will be dismissed in its entirety and closed upon entry of an order as directed in the paragraph below.

Counsel for Defendants are directed to draft and circulate an order that is consistent with

this Decision. If counsel for Plaintiff cannot approve the order as to form, then they may file objections to the form of order. All submissions shall be made by October 21, 2016, and emailed in Word format to sfeddiv5proposedtxt@nmcourts.gov



JENNIFER L. ATTREP
District Judge, Division V

On the date of acceptance for efiling, copies of the above order were eserved on counsel who have registered for eservice in this case.

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Writing Sample # 2

(Reply Brief filed in N.M. Court of Appeals on 2/3/2014)

Pursuant to Rule 12-213 (C) of the New Mexico Rules of Appellate Procedure, Defendants/Appellants Richard H. Love and R.H. Love Galleries, by and through undersigned counsel, hereby submit the following Reply to the Answer Brief of Jerald W. Freeman, The Tea Leaf, Inc., and Thomas Nygard, Inc. ("Plaintiffs' Answer" or "PA"). Because Plaintiffs' Answer offers no basis for affirming the district court's grant of partial summary judgment against Love Defendants, the Court should reverse entry of the same and, as such, need not address the subsequent errors in the damages award. Even if the Court reaches these issues, the damages award is fraught with error and, accordingly, should be reversed.

ARGUMENT

I. The Court Should Determine Whether the District Court Erred in Granting Plaintiffs Partial Summary Judgment and Reverse.

As set forth in Love Defendants' Brief in Chief ("BIC"), the only basis Plaintiffs advanced for granting partial summary judgment on their claims against Love Defendants was their eleventh-hour argument that Benisek was their agent in entering into the Benisek/Love Agreement.[1] Because Plaintiffs failed to make a prima facie showing that Benisek was their agent, the district court erred in

[1] As explained in the Brief in Chief, Plaintiffs did not plead in their complaint that Benisek was their agent. (BIC 4.) This theory only came to light years after this case commenced in response to Love Defendants' motion for summary judgment against Plaintiffs. (*Id.* at 6.)

entering partial summary judgment in Plaintiffs' favor. (BIC 19-23.) In their Answer, Plaintiffs' principal arguments for affirming are that the agency issue was not preserved and the record on review before this Court should be limited. (*See* PA 26-32.) These arguments lack merit.

A. Love Defendants Preserved the Issue of Whether Benisek was Plaintiffs' Agent.

Plaintiffs argue, without citing to any authority, that Love Defendants did not preserve the agency issue for review in this Court. (PA 31-32.) Plaintiffs are incorrect. Both in Love Defendants' response to Plaintiffs' motion for partial summary judgment and at oral argument, Love Defendants argued that summary judgment was inappropriate because there was no basis for Plaintiffs to sue on the Benisek/Love Agreement and Plaintiffs had not established an agency relationship between Benisek and Plaintiffs. In their summary judgment motion, Plaintiffs referred only in passing to Benisek as "Plaintiffs' agent." (RP 3583.) In response, Love Defendants argued that Plaintiffs had not established any privity of contract between Plaintiffs and Love Defendants.[2] (RP 3655-56.) Only in reply did Plaintiffs more fully flesh out their argument for finding privity of contract,

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[2] Subsumed within the privity argument is the sub-issue that no agency relationship existed between Benisek and Plaintiffs. *Cf. Arthur Glick Leasing, Inc. v. William J. Petzold, Inc.*, 51 A.D.3d 1114, 1117 (N.Y. App. Ct. 2008) (discussing principle that an agency relationship may create contractual privity); *Lippy v. Soc. Natl. Bank*, 651 N.E.2d 1364, 1370 (Ohio App. Ct. 1995) (same).

expanding on their belated theory that Benisek was Plaintiffs' "disclosed agent." (*See* RP 3716-17.)

At oral argument on Plaintiffs' motion, Plaintiffs argued that Benisek was their agent and that this provided the "hook" in summarily holding Love Defendants liable to Plaintiffs. (Tr. III, 7:11-25, 9:10-19.) Counsel for Love Defendants argued that a genuine dispute existed as to whether Benisek was Plaintiffs' agent. (*See* Tr. III, 11:6-21 (arguing that whether Benisek was Plaintiffs' agent is main issue of material fact in dispute); *see also id.*, 14:19-21 (describing agency theory as "concocted").) Counsel further argued that the contrary theories of recovery Plaintiffs advanced against Benisek, on the one hand, and Love Defendants, on the other, at the summary judgment stage created a genuine dispute. (*Id.*, 14:1-8 ("[T]he fact that the Plaintiffs are saying, I sold this painting to Mr. Benisek, and I'm suing him, but no, no, actually, Mr. Benisek was my agent, and I sold it to Mr. Love and Love Galleries at the exact same time, that inherent inconsistency is enough to provide the issue of material fact with respect to whether or not the Plaintiffs were actually in a contract with Mr. Love and Love's Gallery.").) In short, the agency issue was the focus of oral argument on Plaintiffs' motion. (*See id.*, 7:11-25, 11:7-12:2, 12:7-11, 13:16-14:8, 14:19-23, 15:4-12, 16:5-11, 16:16-23, 17:13-18:3, 21:1-23:6.)

The agency issue thus was squarely before the district court, and the district court's grant of partial summary judgment clearly was predicated on finding that Benisek was Plaintiffs' agent. (*Id.*, 24:21-25; RP 3963 (concluding "that there are no material issues of fact that the Love Defendants breached the [Benisek/Love Agreement] entered into with Paul Benisek as agent for Plaintiffs as 'Seller' under this Contract").) The agency issue, accordingly, is properly before this Court.[3] *See* Rule 12-216(A) NMRA ("To preserve a question for review it must appear that a ruling or decision by the district court was fairly invoked, but formal exceptions are not required . . . ."); *Harbison v. Johnston*, 2001-NMCA-051, ¶ 8, 130 N.M.

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[3] Even if unpreserved, the Court should review this issue under the general public interest exception. *See* Rule 12-216(B) (providing that the Court may, in its discretion, consider questions involving general public interest, notwithstanding lack of preservation). The broader issue raised by this appeal—whether advancing inconsistent theories of recovery at the summary judgment stage should preclude entry of judgment—falls within the public interest exception. This is an issue that has the potential to affect a large number of cases but has never before been addressed in this jurisdiction. Other jurisdictions squarely reject Plaintiffs' tactics. *See, e.g.*, *Whittom v. Alexander-Richardson P'ship*, 851 S.W.2d 504, 506-07 (Mo. 1993) (requiring "a party to elect between theories of recovery that are inconsistent, even though pled together . . . , before submitting the case to the trier of fact"); *Jones Lang Wootton USA v. LeBoeuf, Lamb, Greene & MacRae*, 243 A.D.2d 168, 177-78 (N.Y. App. Div. 1998) ("[S]ummary judgment being the procedural equivalent of a trial, a litigant must elect among inconsistent positions upon seeking expedited disposition." (citations omitted)); *Cummings v. Bahr*, 685 A.2d 60, 67-68 (N.J. App. Div. 1996) ("This new position is clearly antithetical to the position that plaintiff had held fast to from the time that the initial pleadings were filed . . . . Plaintiff should not be permitted to pick and choose alternative theories of liability and assert them *ad seriatim* in separate proceedings in the same litigation.").

595 (finding issue preserved for appellate review where issue "was squarely before the [district] court," even though not specifically raised by party below); *see also Lopez v. Las Cruces Police Dep't*, 2006-NMCA-074, ¶ 6, 139 N.M. 730 ("Because the trial court was made aware of the issue and knew that [plaintiff] opposed dismissal, we consider the issue preserved for purposes of appellate review.").

B. The Court Should Examine the Whole Record in Reviewing the District Court's Grant of Summary Judgment.

Plaintiffs next argue that this Court should limit its review of the district court's grant of summary judgment to the record the parties presented to the district court during briefing on the motion. (PA 26-30.) Plaintiffs' argument is based on an erroneous reading of this Court's precedents and on inapplicable, out-of-state jurisprudence. Accordingly, it should be rejected by the Court.

The standard of review applicable to a district court's grant of summary judgment in this jurisdiction is well established. "Summary judgment is a drastic remedy to be used with great caution." *Pharmaseal Labs., Inc. v. Goffe*, 90 N.M. 753, 756, 568 P.2d 589 (1977). In light of this, the Court "view[s] the facts in a light most favorable to the party opposing [summary judgment] and draw[s] all reasonable inferences in support of a trial on the merits. [The Court's] review is de novo." *Ocana v. Am. Furniture Co.*, 2004-NMSC-018, ¶ 12, 135 N.M. 539, (internal quotation marks and citations omitted). Furthermore, the Court "examine[s] the ***whole record*** for any evidence that places a genuine issue of

material fact in dispute." *Rummel v. Lexington Ins. Co.*, 1997-NMSC-041, ¶ 15, 123 N.M. 752 (emphasis added); *see also Goffe*, 90 N.M. at 758 (reviewing whole record, including evidence not specifically relied on by plaintiffs, in reversing grant of summary judgment).

It is this last component of the Court's standard of review that Plaintiffs take issue with. Plaintiffs cite to *Spectron Dev. Lab. v. Am. Hollow Boring Co.*, 1997-NMCA-025, 123 N.M. 170, to argue that "whole record" review runs contrary to the rules of preservation and, as such, should not be followed. (PA 27-28.) *Spectron* merely overruled a series of Court of Appeals' cases that read the long-standing "whole record" review to mean that an appellant could raise any issue, regardless of preservation, when appealing from entry of summary judgment. 1997-NMCA-025, ¶¶ 31-32. *Spectron*, however, did not overrule "whole record" review, which repeatedly has been reaffirmed.[4] *See Ocana*, 2004-NMSC-018, ¶ 12 (examining "the whole record for any evidence that places a genuine issue of material fact in dispute" (internal quotation marks omitted)); *Rummel*, 1997-NMSC-041, ¶ 15 (same); *Holzem v. Presbyterian Healthcare Servs.*, 2013-NMCA-100, ¶ 20, 311 P.3d 1198 (reviewing "the whole record in the light most favorable to the party opposing summary judgment to determine if there is any evidence that

[4] Plaintiffs' reliance on out-of-state jurisprudence setting forth the standard of review in Texas provides no basis for departing from the long-standing whole record review in New Mexico. (*See* PA 28-30.)

places a genuine issue of material fact in dispute"); *Loper v. JMAR*, 2013-NMCA-098, ¶ 11, 311 P.3d 1184 (same)

C. The District Court Erred in Granting Plaintiffs' Motion for Partial Summary Judgment.

1. *Plaintiffs failed to make a prima facie showing that Benisek was their agent.*

Even if the Court examines only the "limited record" presented during briefing on Plaintiffs' motion for partial summary judgment, it is clear from this record that Plaintiffs failed to make a prima facie showing that Benisek was their agent. (*See* BIC 19-23.) The ***only*** evidence Plaintiffs relied on to make a prima facie showing of agency was Benisek's statement in the Benisek/Love Agreement that he was a "Seller's Agent." (BIC 21 (citing RP 3583).) As set forth in the Brief in Chief, this is insufficient to establish an agency relationship between Benisek and Plaintiffs. (BIC 21-23.) Plaintiffs do not argue—because they cannot—that a purported agent's statement is sufficient to make a prima facie showing of agency. Instead, Plaintiffs raise a number of faulty arguments that do not save the district court's erroneous grant of summary judgment.

First, Plaintiffs argue that Love Defendants conceded or ratified the agency relationship between Plaintiffs and Benisek. (PA 32-33.) As support, Plaintiffs cite to the Benisek/Love Agreement and various statements (including hearsay) by Mr. Love. (PA 33.) Yet Plaintiffs cite to no authority suggesting that Love

Defendants' belief or understanding about the existence of an agency relationship is proof of agency. Indeed, this is not the law. "Whether a relationship is characterized as agency in an agreement between parties or in the context of industry or popular usage is not controlling." Rest. 3d Agency § 1.02. An agency relationship arises only when "one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." *Id.* § 1.01; *see also id.* § 1.02 (referring to agency as "fiduciary relationship"); *Hydro Res. Corp. v. Gray*, 2007-NMSC-061, ¶¶ 39-42, 143 N.M. 142 (describing elements of agency relationship). Mr. Love's subjective and colloquial understanding that Benisek was an "agent" is not proof that any agency relationship actually existed.

Second, Plaintiffs argue for the first time that Freeman "ratified the agency of Mr. Benisek." (PA 33-35, 37.) This argument is baseless. The concept of "ratification" by the principal of an agent's unauthorized acts comes into play ***only after*** an agency relationship already has been established. In other words, "ratification" cannot prove the agency relationship itself. *John D. Arnold Family Ltd. P'ship v. Delgadillo*, No. 28,231, 2010 WL 3971763, at *4 (N.M. Ct. App. Jan. 5, 2010) (unpublished) ("We therefore do not consider the issues of ratification and acquiescence because they are concerned with the scope of the

agent's authority, rather than the existence of the relationship in the first place." (citing *Bd. of County Comm'rs v. Chavez*, 2008-NMCA-028, ¶ 15, 143 N.M. 543)). Case law cited by Plaintiffs is not to the contrary. *See Guar. Nat. Ins. Co. v. C de Baca*, 120 N.M. 806, 809, 907 P.2d 210 (Ct. App. 1995) (discussing ratification as "the adoption or confirmation by a principal of an unauthorized act performed on its behalf by an agent" in an already existing agency relationship); *Chavez*, 2008-NMCA-028, ¶ 15 (same); *Ulibarri Landscaping Material, Inc. v. Colony Materials, Inc.*, 97 N.M. 266, 270, 639 P.2d 75 (Ct. App. 1981) (same); *Grandi v. LeSage*, 74 N.M. 799, 809, 399 P.2d 285 (1965) (same). Accordingly, Plaintiffs' newfound argument that they created an agency relationship with Benisek by pursuing enforcement of the Benisek/Love Agreement as one of Love Defendants' creditors is unavailing. (PA 35.)

Third, Plaintiffs argue—without citing any authority—that the inconsistencies between, on the one hand, suing Benisek on the Freeman/Benisek Agreement as an arms-length transaction and, on the other, arguing that Benisek was their agent in entering into the Benisek/Love Agreement, does not create a disputed issue of material fact. (PA 36.) This is incorrect. Advancing inconsistent theories of liability at the summary judgment stage precludes entry of judgment. *See supra* note 3; *cf. Zuniga v. Zuniga*, No. 29,161, 2009 WL 6581104, at *2

(N.M. Ct. App. Sept. 2, 2009) (unpublished) (holding that "internal conflicts do not support summary judgment").

In sum, even if the Court examines only the "limited record," it is clear that the district court erred in entering summary judgment because Plaintiffs failed to make a prima facie case. *See Brown v. Taylor*, 1995-NMSC-050, 120 N.M. 302, 305; *see also Chavez v. Sundt Corp.*, 1996-NMSC-046, ¶ 5, 122 N.M. 78. Moreover, if the Court examines the whole record, as required under controlling precedents, the record reveals that Plaintiffs' concocted theory that Benisek was their agent plainly was disputed and without support in the record or in reality.[5] (*See* BIC 23-25 (citing, among other things, the sworn testimony of Freeman (the purported principal) that Benisek (the purported agent) was "***absolutely not***" his agent).) For these reasons, the district court's grant of partial summary judgment against Love Defendants should be reversed.[6] If the Court reverses summary

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[5] That this never-pled theory of agency was concocted at the last minute is highlighted by the fact that this theory was absent from Plaintiffs' request for damages at the trial against Love Defendants. Even though the district court previously had awarded liability to Plaintiffs based on the Benisek/Love Agreement, Plaintiffs sought (and were awarded) damages related to the amount that was still due on the ***Freeman/Benisek Agreement***. (*See* BIC 38; Plaintiffs Exs. 99, 100.)

[6] In addition, a "whole record" review reveals that there in fact was no agency relationship between Benisek and Plaintiffs, eliminating disputed issues of fact on Love Defendants' motion for summary judgment. (*See* BIC 25 n.12.) As such, the district court's denial of Love Defendants' motion for summary judgment also was in error.

judgment for the foregoing reasons, the Court need not address the remaining issues below.

2. *The district court's findings on Counts IV and V are insufficient to support its judgment on these counts.*

As set forth in the Brief in Chief, the district court's July 6, 2011 Order, granting Plaintiffs partial summary judgment, made deficient factual findings on the negligent misrepresentation (Count IV) and fraud (Count V) claims that do not support the district court's legal conclusion that judgment for Plaintiffs was warranted. (BIC 26-29.) Because the district court's failure to find a material fact is regarded as a finding against Plaintiffs, judgment on these claims must be reversed. (*See id.* at 26-27.) Plaintiffs avoid addressing this plain assignment of error. Instead, they argue that this issue was not preserved or that the defects in the judgment were somehow cured by the pretrial order. (PA 38-39.) These arguments are without merit.

First, this issue was preserved. As set forth in the Brief in Chief, the district court's factual findings on Counts IV and V were deficient because they failed to make any findings with respect to whether: (1) Love Defendants intended Plaintiffs to rely on their statements or intended to deceive Plaintiffs with such statements, (2) Plaintiffs in fact relied on such statements, and (3) such reliance caused Plaintiffs harm. (BIC 28-29.) This issue was addressed in Love Defendants' response to Plaintiffs' motion for partial summary judgment. (RP 3657-59

(arguing, *inter alia*, that whether Love Defendants made any misrepresentations, Plaintiffs relied on any such misrepresentation, and Love Defendants had any intent to deceive were disputed material facts).) The issue, accordingly, was preserved, and it was not incumbent upon Love Defendants to move the district court for reconsideration of the error invited by Plaintiffs. *See* Rule 12-216(A) NMRA; *see also Rio Grande Sun v. Jemez Mountains Pub. Sch. Dist.*, 2012-NMCA-091, ¶ 24, 287 P.3d 318 (holding that party need not file a motion to reconsider in order to preserve issue for appeal).

Second, the pretrial order does not save the district court's deficient findings. Plaintiffs contend that Love Defendants conceded certain issues in the pretrial order, thereby curing any problems with the July 6, 2011 Order and foreclosing appeal of these issues. (PA 38-39.) Plaintiffs' contentions are wrong. As a legal matter, the purpose of a pretrial conference and order is to limit issues for trial and reduce surprise, not to cure prior errors by the trial court or limit issues for appeal. *See Johnson v. Citizens Cas. Co. of N.Y.*, 63 N.M. 460, 464, 321 P.2d 640 (1958). As a factual matter, even if the pretrial order could have cured the district court's order, it did not. The same deficient factual findings set forth in the

July 6, 2011 Order are repeated in the pretrial order.[7] (*Compare* RP 3963-65, *with* RP 4005-06.)

II. The District Court Committed Error in Awarding Damages to Plaintiffs.

Plaintiffs argue, *inter alia*, that the errors in the district court's damages award were not preserved and should not be considered by this Court. As an initial matter, the Court need not address any of the errors identified with the damages trial and resulting judgment if it reverses the district court's grant of partial summary judgment. *See Bogle v. Summit Inv. Co., LLC*, 2005-NMCA-024, ¶ 27, 137 N.M. 80 (reversing damages award where Court reversed on liability). If the Court does not reverse the district court's entry of partial summary judgment and further determines that the issues raised in the Brief in Chief were not preserved by Love Defendants' motion for new trial, the Court nevertheless should review the

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[7] Love Defendants additionally argued that disputed issues of material fact precluded summary judgment on Counts IV and V. (BIC 29-32.) As highlighted in the Brief in Chief, Plaintiffs relied ***only*** on statements that Benisek (their purported agent) made in his contract with Plaintiffs as evidentiary support for the reliance element of their fraud and negligent misrepresentation claims against Love Defendants. (*Id.* at 32.) This alone precludes summary judgment on these counts, and Plaintiffs simply ignore this patent error.

Finally, for the reasons stated in the Brief in Chief, because Plaintiffs' fraud claim sounds in contract, the district court erred in entering summary judgment on the fraud count against Mr. Love personally. (BIC 32-34 (citing *Kreischer v. Armijo*, 118 N.M. 671, 673, 884 P.2d 827 (Ct. App. 1994)).) Plaintiffs generally argue that this case is "in the sphere of tort law," but do not explain why *Kreischer's* reasoning is inapplicable in this case. (*See* PA 42-43.)

district court's award of damages under the general public interest exception. *See* Rule 12-216(B) NMRA.

This Court has "invoked the general public interest exception to the preservation rule where review of the appellate issue is likely to settle a question of law affecting the public at large or a great number of cases and litigants in the near future." *Azar v. Prudential Ins. Co. of Am.*, 2003-NMCA-062, ¶ 28, 133 N.M. 669; *see also Andrews v. Saylor*, 2003-NMCA-132, ¶ 25, 134 N.M. 545 (addressing unpreserved "question of whether an attorney sued for legal malpractice may base the defense of comparative fault on the alleged malpractice of successor attorneys" because it "presents a question of 'general public interest'"); *Pineda v. Grande Drilling Corp.*, 111 N.M. 536, 540, 807 P.2d 234 (Ct. App. 1991) (reaching unpreserved issue of whether specific Workers' Compensation Division ("WCD") rule was applicable because "the broader question of when in general WCD rules can be applied" affects the public interest).

This case presents the issue of whether the New Mexico Uniform Commercial Code ("UCC") governs the damages available to a seller of a good who sues the buyer for breach of contract and fraudulent inducement, where the alleged misrepresentations are contained within the contract's terms. This is an open issue in New Mexico and, because it has the potential to affect countless

cases involving the sale of goods, the Court should review the district court's damages award.

The district court awarded Plaintiffs $731,744 in compensatory damages, which included the amount still owed on the Freeman/Benisek Agreement, interest expense, and "lost business profits" from not receiving payment on the Freeman/Benisek Agreement. (*See* BIC 11-13.) In the Brief in Chief, Love Defendants argued that Plaintiffs' remedies were governed by the UCC, and, as such, the district court's compensatory damages award for "lost profits" was erroneous. (BIC 38-39); *see* also NMSA 1978, § 55-2-709 (limiting seller's damages to sale price and incidentals). Plaintiffs argue that the UCC does not displace common law tort remedies, which include lost profits as consequential damages. (*See* PA 43-45.)

Although New Mexico has not addressed this precise issue, Plaintiffs' argument is unavailing because it fails to account for the economic-loss rule. As explained by the New Mexico Supreme Court,

> [t]he purpose of the economic-loss rule . . . is to preserve the bedrock principle that contract damages be limited to those within the contemplation and control of the parties in framing their agreement . . . . As a matter of policy, the parties should not be allowed to use tort law to alter or avoid the bargain struck in the contract. The law of contract provides an adequate remedy.

In re Consol. Vista Hills Retaining Wall Litig., 119 N.M. 542, 550, 893 P.2d 438 (1995) (internal quotation marks omitted). Plaintiffs correctly point out that New

Mexico has adopted the UCC provision that, "[u]nless displaced by the particular provisions of the [UCC], the principles of law and equity, including . . . the law relative to . . . fraud [and] misrepresentation . . . supplement its provisions." (PA 43-44 (quoting NMSA 1978, § 55-1-103(b)).) As recognized by other jurisdictions, however, "[t]he provision cited by [P]laintiff[s] merely keeps intact those areas of the common law not superseded by specific provisions of the UCC. The body of common law sought to be preserved in this provision is the same body of law in which the economic loss doctrine arose." *Huron Tool & Eng'g Co. v. Precision Consulting Servs., Inc.*, 532 N.W.2d 541, 546 (Mich. Ct. App. 1995).

Accordingly, where the "allegations of fraud are not extraneous to the contractual dispute, [the] plaintiff is restricted to its contractual remedies under the UCC." *Id.*; *see also Kaloti Enters., Inc. v. Kellogg Sales Co.*, 699 N.W.2d 205, 220 (Wis. 2005) ("Tort law will apply only under circumstances . . . where one party induces another to enter into a contract by representing . . . a fact that would be material to the other party's decision to enter into the contract, but that concerns matters extraneous to the contract's terms."); *Sunquest Info. Sys., Inc. v. Dean Witter Reynolds, Inc.*, 40 F. Supp. 2d 644, 651 (W.D. Pa. 1999) ("Put simply, a plaintiff cannot assert a fraud or negligent misrepresentation claim when that theory is merely another way of stating its breach of contract claim or when its

success would be wholly dependent upon the terms of the contracts." (internal quotation marks, alteration, and citation omitted)).

In this case, as in *Huron Tool* and numerous other cases applying the economic-loss rule under similar circumstances, the misrepresentations underlying Plaintiffs' fraud and negligent misrepresentation claims "are indistinguishable from the terms of the contract . . . that [P]laintiff alleges were breached." *Huron Tool*, 532 N.W.2d at 546; (*see also* PA 4-5 (listing alleged misrepresentations contained in Benisek/Love Agreement); BIC 30 (arguing that same misrepresentations formed basis of Plaintiffs' tort claims)). Accordingly, because Plaintiffs' tort claims were intrinsic to their breach of contract claim, Plaintiffs were entitled to no more than contract remedies allowed under the UCC, and, as such, the district court's award of lost profits and interest expense was in error. *See Bev Smith, Inc. v. Atwell*, 836 N.W.2d 872, 883 (Mich. Ct. App. 2013) (holding "plaintiff was limited to its contractual remedies under the UCC" because alleged fraudulent misrepresentations indistinguishable from contractual terms allegedly breached); *AKA Dist. Co. v. Whirlpool Corp.*, 137 F.3d 1083, 1087 (8th Cir. 1998) (holding under Minnesota law that plaintiff was limited to UCC remedies for breach of contract where fraudulent inducement claim was predicated on terms of contract that were breached).

Finally, because the compensatory damages award was in error, the Court also should reverse the punitive damages award. *See Gonzales v. Sansoy*, 103 N.M. 127, 129, 703 P.2d 904 (Ct. App. 1984) ("Because we reversed on the compensatory damages claim, we did not reach the issue of punitive damages in the initial appeal. An award of punitive damages must be supported by an award of compensatory damages.").

CONCLUSION

For all the foregoing reasons and the reasons set forth in the Brief in Chief, Love Defendants respectfully request that the Court reverse the district court's grant of summary judgment and its damages award against Love Defendants and in favor of Plaintiffs.

Respectfully submitted,

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REC'D AUG 1 0 REC'D

State of New Mexico
First Judicial District Court
LOS ALAMOS COUNTY
RIO ARRIBA COUNTY
SANTA FE COUNTY

CHAMBERS OF
SARAH M. SINGLETON
CHIEF JUDGE
DIVISION II

POST OFFICE BOX 2268
SANTA FE, NM 87504
PHONE: (505) 455-8160
FAX: (505) 455-8164

August 10, 2017

Alfred Mathewson, Chair of the Appellate Court
Judicial Nominating Commission
UNM School of Law
MSC11 6070
1 University of New Mexico
Albuquerque, NM 87131-0001

Re: Application of Jennifer Attrep for Court of Appeals

Dear Dean Mathewson:

[redacted]

[redacted]

Sincerely,

Sarah M. Singleton

Judicial Nomination Commission
Attn: Chair
UNM School of Law
MSC11 6070
1 University of New Mexico
Albuquerque, NM 87131-0001
jso@law.unm.edu

August 7, 2017

Dear Sir or Madam:

[redacted]

Sincerely yours,

Benjamin R. Schrope

John B. Pound, LLC

Attorney at Law

505 Don Gaspar
Santa Fe, NM 87505

Phone: (505) 983.8060
Fax: (505) 986.1028
Email: JBPSFNM@gmail.com

August 2, 2017

Alfred Mathewson - Chair
Judicial Nominating Commission
UNM School of Law
MSC11 6070
1 University of New Mexico
Albuquerque, NM 87131-0001

RE: Application of Jennifer L. Attrep

Dear Mr. Mathewson:

[redacted]

[redacted]

Sincerely,

John B. Pound

JBP:dk

REC'D AUG 16 REC'D

Larry J. Montaño
1429 Bishops Lodge Road
Santa Fe, New Mexico 87506
Phone (505) 954-1347

August 16, 2017

VIA ELECTRONIC MAIL

Judicial Nominating Commission
Attn: Chair
UNM School of Law
1 University of New Mexico, MSC11 6070
Albuquerque, New Mexico 87131-0001
Fax: (505) 277-1597
Email: jso@law.unm.edu

Re: The Honorable Jennifer L. Attrep, reference letter for New Mexico Court of Appeals

Dear Chair:

[redacted]

[redacted]

Sincerely,

Larry J. Montaño

REC'D AUG 16 REC'D

State of New Mexico
Court of Appeals
POST OFFICE BOX 25306
Albuquerque, NM
87125

J. Miles Hanisee
JUDGE

(505) 767-6123
Fax (505) 841-4614

August 16, 2017

Attn: Chair
Chair of the Judicial Nominating Commission
1 University of New Mexico
MSC11 6070
Albuquerque, NM 87131-0001

Re: Recommendation for Judge Jennifer L. Attrep

Dear Chair:

[redacted]

Sincerely,

Judge J. Miles Hanisee
New Mexico Court of Appeals